

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MIGDALIA CORTES and U.S. POSTAL SERVICE,
POST OFFICE, New Haven, Conn.

*Docket No. 96-2253; Submitted on the Record;
Issued July 14, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant was at fault in the matter of an overpayment of compensation in the amount of \$770.04, and, if so, whether the Office of Workers' Compensation Programs properly recovered the overpayment by deducting the amount of the overpayment from appellant's periodic payment for a schedule award.

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."¹ No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or, alternatively, "with fault," section 10.320 of Title 20 of the Code of Federal Regulations states in pertinent part:

"An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or

¹ 5 U.S.C. § 8129.

(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”²

At a February 15, 1996 hearing before an Office hearing representative and on appeal before the Board, appellant does not dispute that an overpayment in the amount of \$770.04 occurred when she returned to work on May 15, 1995 and received compensation until May 26, 1995. The Board finds that appellant was at fault in the matter of this overpayment on the basis that she accepted a payment she knew or should have been expected to know was incorrect. In an April 10, 1995 letter, the Office advised appellant of the rate of compensation she would be paid until she returned to work, and further advised her; “To avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Return to us any compensation check received after you return to work.” Appellant did not return the compensation check she received after her return to work. As she knew or should have known that she could not work and receive compensation for disability, she is at fault in the matter of the overpayment. Since appellant is not without fault, the overpayment cannot be waived.

The Board further finds that the Office properly recovered the overpayment by deducting the amount of the overpayment from appellant’s periodic payment for a schedule award.

As noted above, section 8129(a) of the Act provides for recovery of an overpayment of compensation “by decreasing later payments to which the individual is entitled.” 20 C.F.R. § 10.321(a) provides: “Whenever an overpayment of compensation has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual.”

An Office hearing representative, in a June 20, 1996 decision, considered appellant’s financial circumstances and determined that it would be in her best interest to have the amount of the overpayment deducted from her next payment under a schedule award. The record establishes that, at the time of the Office hearing representative’s decision, appellant had returned to full-time employment with the employing establishment at a pay rate of \$35,136.00 per year, or \$675.69 per week, and that her net pay after all deductions was \$911.43 for a two-week pay period, which is equivalent to \$1,974.76 per month. Appellant’s list of monthly expenses amounted to a total of \$1,773.46. Appellant thus was able to meet her monthly expenses with her pay for working, and recovering the overpayment by deducting it from the schedule award that appellant was issued on April 5, 1996 would not cause undue hardship.

² 20 C.F.R. § 10.320(b).

The decision of the Office of Workers' Compensation Programs dated June 20, 1996 is affirmed.

Dated, Washington, D.C.
July 14, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member